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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

FAIR POLITICAL PRACTICES COMMISSION, a state agency, Plaintiff, vs. AGUA CALIENTE BAND OF CAHUILLA INDIANS, a federally-recognized Indian tribe; and DOES I-XX, Defendants.	Civil case no. 02AS04545 OPENING MEMORANDUM OF POINTS AND AUTHORITIES OF SPECIALLY-APPEARING DEFENDANT AGUA CALIENTE BAND OF CAHUILLA INDIANS IN SUPPORT OF MOTION TO QUASH SERVICE FOR LACK OF PERSONAL JURISDICTION [C.C.P. §418.10] Hearing: December 4, 2002 2:00 p.m. Dept. 53

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INTRODUCTION

By this civil action a state government agency, the Fair Political Practices Commission (the "FPPC"), seeks an injunction to compel an Indian tribe to comply with a state statute, and damages for supposed non-compliance. The state statute is a laudatory one, the Political Reform Act, Government Code §81000, et seq. It generally requires the disclosure of certain kinds of political campaign contributions and identification of issues on which lobbyists are engaged, by both the party making the contributions and engaging the lobbyists, and by the recipients of the contributions and the lobbyists who are engaged. In this case, the recipients and lobbyists have both made full disclosure. The FPPC does not claim otherwise. The data which the FPPC seeks is thus no secret. *All* of it is already available in the reports filed with the appropriate officials by the recipients and lobbyists.[1] The Tribe has also similarly voluntarily filed *all* its reports for the periods beginning in 1998, although not always on the FPPC's forms or on its timetable.

Therefore, this case is not about disclosure. The Tribe, the recipients, and the lobbyists have already disclosed *every* shred of information called for by the Political Reform Act. Instead, this case is about power. Under the distribution of sovereignty among the states and tribes recognized in the U.S. Constitution, no state agency may use a state court to compel a federally-recognized Indian tribe to submit to a state statute. No matter what the merits of a state agency's state law claim, or how desirable submission of the tribe to state law may seem to the state agency, that state agency cannot arrogate to itself the power to overcome a tribe's sovereignty, especially its sovereign immunity from unconsented suit. The Tribe and its sovereignty are subordinate only to the federal government, not the states. The Tribe remains immune from this or any other suit in this state court unless Congress directs otherwise.

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[1] The same information for the current reporting period is also even more available to everyone, including the FPPC, at the Tribe's website: www.aguacaliente.org See the link entitled "FPPC and Lobbyist Report" and the 57 pages of reports posted there for all to see.

SUMMARY OF ARGUMENT

As a separate sovereign and a domestic, dependent nation, pre-dating both the U.S. Constitution and the State of California, the Agua Caliente Band of Cahuilla Indians (hereinafter, the "Tribe") enjoys sovereign immunity from this unconsented suit, thus depriving this Court of personal jurisdiction over the Tribe.[2] In ruling on this motion, there is no balancing of interests. There is no consideration of the merits of the FPPC's claims. Recognition of the immunity is mandatory, not discretionary. The doctrine is exclusively a matter of federal law, and applies in all cases, including those brought by a state or its agencies to enforce a state statute.

To the extent that the FPPC may allege a waiver of the Tribe's immunity, that claim is barred by the res judicata or issue preclusion effect of a prior judgment, from which no appeal was taken, between the same parties or those in privity with them. Even were that claim not so precluded, any off-reservation conduct in which the Tribe may have engaged is irrelevant because the Tribe's immunity extends to off-reservation conduct. The FPPC has not shown the requisite express and unequivocal waiver by either Congress or the Tribe. Therefore, the immunity remains fully intact, and the Court lacks personal jurisdiction over the Tribe.

I. THE GENERAL NATURE AND STATUS OF INDIAN TRIBES

An Indian tribe is not a voluntary social organization of persons of Indian descent. It is not a corporation. It is not a branch of the federal or any other government. Instead, it is an independent political entity, possessing many attributes of sovereignty, and functioning as the local government on its reservation, separate of its members, much as the State of California exists and acts separately from its citizens. Indian tribes are sovereigns and local governments:

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[2] The Court also lacks subject matter jurisdiction over this action against the Tribe, but the Tribe does not raise this issue at this time, although it will do so later, if necessary. Notably, only the Tribe itself is named as a defendant in this action. The issue of the scope of the Court's jurisdiction over individual members of the Tribe thus does not arise.

. . . as we have recognized [cit.om.], Indian tribes are sovereigns.
Blatchford v. Native Village of Noatak, 501 U.S. 775, 780 (1991)

Indian tribes are "domestic dependent nations," which exercise inherent sovereign authority over their members and territory.
Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991)

The tribes are, to be sure, "a good deal more than 'private voluntary organizations,'" and are aptly described as "unique aggregations possessing attributes of sovereignty over both their members and their territory." [cit.om.]
Duro v. Reina, 495 U.S. 676, 688 (1990)

Indian Tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. [cit.om.] Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." [cit.om.] They have power to make their own substantive law in internal matters [cit.om.], and to enforce that law in their own forums.
Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978)

Tribes are, foremost, sovereign nations. They "retain[] their original natural rights" as "aboriginal entit[ies] antedating the federal [and state] governments."
American Vantage Co. Inc. v. Table Mountain Rancheria, 292 F.3d 1091, 1096 (9th Cir., 2002, insertion by Court)

II. THE AGUA CALIENTE BAND OF CAHUILLA INDIANS IS A FEDERALLY-RECOGNIZED INDIAN TRIBE.

Appearing specially only for purposes of this motion, the Tribe has separately requested the Court to take judicial notice that it is a federally-recognized Indian tribe. If there is any doubt, see *LaPier v. McCormick*, 986 F.2d 303, 304 (9th Cir., 1993), in which the Ninth Circuit regarded the list cited in the separate request as authoritative: "Absent evidence of its incompleteness, the BIA list appears to be the best source to identify federally acknowledged tribes . . .". Furthermore, the FPPC has alleged at ¶9, p. 3, lines 10-11, of its First Amended Complaint that the Tribe "is a federally recognized Indian Tribe." Therefore, the FPPC cannot, and does not, dispute that the Tribe is a federally-recognized Indian tribe.

III. ONE ASPECT OF RETAINED TRIBAL SOVERIGNTY IS SOVEREIGN IMMUNITY FROM UNCONSENTED SUIT.

As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. . . .

In light of these concerns, we decline to revisit our case law and choose to defer to Congress. Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754, 760 (1998)

Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.

Oklahoma Tax Commission v. Citizen Band of Potawatomi Indians, 498 U.S. 505, 509 (1991)

Indian Tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner vs. United States*, 248 U.S. 354, 358, 63 L Ed 291, 39 S.Ct. 109 (1919); *United States vs. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513, 84 L Ed 894, 60 S.Ct. 653 (1940); *Puyallup Tribe vs. Washington Dept. of Game*, 433 U.S. 165, 172-173, 53 L Ed 2d 667, 97 S.Ct. 2616 (1977)

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)

Indian tribes have long been recognized as possessing common-law immunities from suit co-extensive with those enjoyed by other sovereign powers including the United States as a means of protecting tribal political autonomy and recognizing their tribal sovereignty which substantially pre-dates our Constitution. [cit.om.] Absent congressional or tribal consent to suit, state and federal courts have no jurisdiction over Indian tribes; only consent gives the courts the jurisdictional authority to adjudicate claims raised by or against tribal defendants. [cit.om.]

Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 418 (9th Cir., 1989)

IV. THE ISSUE OF TRIBAL SOVEREIGN IMMUNITY MUST BE RESOLVED PRIOR TO AND IRRESPECTIVE OF THE MERITS OF THE FPPC'S CLAIMS.

As a pure question of personal jurisdiction, tribal sovereign immunity from unconsented

suit is, ipso, facto, jurisdictional in nature, unrelated to the merits of the FPPC's claims:

> The issue of tribal sovereign immunity is jurisdictional in nature.
> *McClendon v. U.S.*, 885 F.2d 627, 629 (9th Cir., 1989)

> Thus, since the issue of tribal sovereign immunity is jurisdictional in nature, *Puyallup III*, 433 U.S. at 173; USF&G, 309 U.S. at 512; *Chemehuevi State Bd. of Equalization*, 757 F.2d 1047, 1051 (9th Cir.), *rev'd in part on other grounds*, 474 U.S. 9 (1985); [cit.om.] we must first determine whether the Band has effectively waived tribal immunity--thus making it amenable to suit in federal court--irrespective of the merits of Pan Am's tort and contractual claims.
> *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir., 1989)

> The question of tribal sovereign immunity is jurisdictional in nature. [cit.om.] Accordingly, we must address it first and resolve it irrespective of the merits of the claim.
> *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1051 (9th Cir., 1985); reversed on other grounds, 474 U.S. 9 (1985)

While the doctrine is often applied regarding tort and contract claims, it applies to *all* claims, including those in which a state or state agency seeks to apply a state statute directly against a tribe. The leading case on this point is *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian* Tribe, 498 U.S. 505 (1991) in which the doctrine barred a state agency's counterclaim against a tribe to enforce a state tax assessment. See also *People of State of California v. Quechan Indian Tribe*, 595 F.2d 1153 (9th Cir., 1979), in which the doctrine barred the California Department of Fish & Game from enforcing California's fish and game laws on a reservation; *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1053 (9th Cir., 1985), *reversed on other grounds*, 474 U.S. 9 (1985), in which a tribe's immunity barred a counterclaim for a California tax; and *Middletown Rancheria of Pomo Indians v. Workers' Compensation Appeals Board*, 60 Cal.App.4th 1340, 71 Cal.Rptr.2d 105 (1998), in which the Fourth District concluded that the Workers' Compensation Appeals Board lacked jurisdiction to enforce California's Workers' Compensation laws against a tribal enterprise.

The Fourth District cites *Quechan, supra,* with approval in upholding a tribe's immunity:

> As dependent, quasi-sovereign nations, Indian Tribes, such as the Chemehuevi, enjoy sovereign immunity, and cannot be sued without the consent of Congress. . . .
>
> *Quechan* summarizes the situation. "It is a well-established rule that Indian tribes are immune from suit. (cit.om.) The sovereign immunity of Indian tribes is similar to the sovereign immunity of the United States; neither can be sued without the consent of Congress. (cit.om.) . . .Any waiver of immunity is not to be lightly implied, but must be unequivocally expressed. (cit.om.)" (At page 1155.) *Quechan* concluded that Tribal Sovereign Immunity was a bar to a Declaratory Relief Action filed by the State of California . .
>
> In the absence of a clear waiver, we must recognize the sovereign immunity of the Chemehuevi Tribe.
>
> *Long v. Chemehuevi Indian Reservation,* 115 Cal.App.3d 853, 856-858; 171 Cal.Rptr. 733, 734-6 (1981)

Therefore, the doctrine applies equally in *all* cases, including those in which a state or state agency seeks to overcome a tribe's immunity so as to apply a state statute directly to the tribe.

V. RECOGNITION OF TRIBAL SOVEREIGN IMMUNITY IS MANDATORY, NOT DISCRETIONARY, AND DOES NOT BALANCE THE INTERESTS OF THE PARTIES.

> Pan Am in essence asks this court to imply a waiver of tribal sovereign immunity from the text of the arbitration clause since this provision, Pan Am contends, would otherwise "merely be a trap for the unsuspecting" and leave Pan Am without judicially enforceable remedies for the Band's alleged breach of contract. Yet Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation. *USF&G.* 309 U.S. at 513; *Chemehuevi,* 757 F.2d at 1052 n. 6 (sovereign immunity not "discretionary doctrine that may be applied as a remedy depending on the equities of a given situation"); [cit.om.]
>
> *Pan American Co. v. Sycuan Band of Mission Indians,* 884 F.2d 416, 419 (9th Cir., 1989)

> Sovereign immunity involves a right which Courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy, as suggested by California's argument, the application of which is within the discretion of the Court.
>
> *People of State of California v. Quechan Tribe of Indians,* 595 F.2d 1153, 1155 (9th Cir., 1979)

However, the District Court offered no authority for the application of a balancing test in the present circumstances. By contrast, the Supreme Court has adopted a more categorical approach denying state jurisdiction where states attempt to assert such jurisdiction over a tribe absent a waiver by the tribe or a clear grant of authority by Congress. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S.Ct. 2214, 132 L.Ed.2d.2d 400 (1995) (Citing *Bryan* [*v. Itasca County*], 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710). Though the rule is not a *per se* rule, *see California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214, 215, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), cases applying a balancing test have involved state assertions of authority over non-members on reservations and in exceptional circumstances over the on-reservation activities of tribal members, *see, e.g.*, [*New Mexico v.*] *Mescalero Apache Tribe*, 462 U.S. [324] at 331-332, 103 S.Ct. 2378; [*Moe v.*] *Confederated Salish & Kootenai Tribes*, 425 U.S. [463], at 480, 96 S.Ct. 1634. Because Defendants attempted to assert jurisdiction over the Tribe, and not over individual tribal members or non-members on tribal land, the District Court erroneously applied a balancing test.

Bishop Paiute Tribe v. County of Inyo, 291 F.3d 549, 559 (9th Cir., 2002)

VI. CALIFORNIA COURTS FULLY RECOGNIZE TRIBAL SOVEREIGN IMMUNITY.

Indian Tribes are immune from suit in the absence of an effective waiver or consent.

People ex rel. Department of Transportation v. Naegele Outdoor Advertising Co., 38 Cal.3d 509, 519; 213 Cal.Rptr. 247, 253 (1985); and *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council*, 170 Cal.App. 3d 491, 494, 216 Cal.Rptr. 59, 62 (1985)

An aboriginal American tribe is a sovereign and "As a matter of federal law, . . . is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." (*Kiowa, supra*, 523 U.S. at p. 754, 118 S.Ct. at 1700; see *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1419-1420, 88 Cal.Rptr.2d 828 . . .

Redding Rancheria v. Superior Court, 88 Cal.App.4th 384, 387; 105 Cal.Rptr.2d 773, 775 (2001)

Moreover, our state Supreme Court steadfastly recites that Native American Indian tribes "enjoy broad sovereign immunity from lawsuits" (*Boisclair* [*v. Superior Court*, 51 Cal.3d 1140, 276 Cal.Rptr. 62 (1990], 51 Cal.3d at p. 1157, 276 Cal.Rptr. 62, 801 P.2d 305, citing *Santa Clara Pueblo v. Martinez*, (1978) 436 U.S. 49, 59. ..

> While Congress can authorize suits against Indian Nations, we are required, as a matter of law, to recognize Tribe's sovereign immunity status in the absence of an explicit congressional waiver.
> *Middletown Rancheria of Pomo Indians v. Workers Compensation Appeals Board*, 60 Cal.App.4th 1340, 1347; 71 Cal.Rptr.2d 105, 109-110, 110 (1998)

See also *Great Western Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal.App.4th 1407, 1419; 88 Cal.Rptr.2d 828, 836-837 (1999); *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 635-636; 84 Cal.Rptr.2d 65, 67 (1999).

VII. ANY WAIVER OF TRIBAL SOVEREIGN IMMUNITY MUST BE EXPRESS AND UNEQUIVOCAL.

The California Supreme Court has held that any waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." *People ex rel. Department of Transportation v. Naegele Outdoor Advertising Co.*, 38 Cal.3d 509, 519; 213 Cal.Rptr. 247, 253 (1990). This holding flows from a previous holding from the U.S. Supreme Court, which has been followed consistently by the California Courts of Appeals:

> It is settled that a waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" [cit.om.]
> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Middletown Rancheria of Pomo Indians v. Workers' Compensation Appeals Board*, 60 Cal.App.4th 1340, 1347; 71 Cal.Rptr.2d 105, 110 (1998);); *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council*, 170 Cal.App.3rd 489, 498; 216 Cal.Rptr.59, 64 (1985)

VIII. THE EXTENT OF TRIBAL SOVEREIGN IMMUNITY IS EXCLUSIVELY A MATTER OF FEDERAL LAW.

The California Supreme Court recognizes the primacy of federal law regarding Indian tribes. See *Boisclair v. Superior Court*, 51 Cal.3d 1140, 1147-1148; 276 Cal.Rptr.62, 66-67 (1990). This is because "The federal government has plenary and exclusive power to deal with tribes. [cit.om.] States, on the other hand, interact with tribes in a more limited capacity."

Ramsey v. U.S., 302 F.3d 1074, 1078 (9th Cir., 2002). *Only* federal law can define or limit the scope of tribal sovereign immunity, as the federal and state courts have uniformly held:

> *As a matter of federal law*, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. See *Three Affiliated Tribes of Fort Brthold Reservation v. Wold Engineering*, 476 U.S. 877, 890, 106 S.Ct. 2305, 2312-2313, 90 L.Ed.2d 881 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1676-1677, 56 L.Ed.2d 106, (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512, 60 S.Ct. 653, 656, 84 L.Ed. (1940) . . .
>
> Like foreign sovereign immunity, *tribal immunity is a matter of federal law.*
>
> *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751, 754, 759 (1998, emphasis added)

> So tribal [sovereign] immunity is a matter of federal law and is not subject to diminution by the States.
>
> *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751, 756 (1998); cited in *Redding Rancheria v. Superior Court*, 88 Cal.App.4th 384, 389; 105 Cal.Rptr.2d 773, 777 (2001)

> The Court has consistently recognized that . . . "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."
>
> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987)

> Tribes also owe no allegiance to a state. Because "Congress possesses plenary power over Indian affairs," [cit.om.], Indian tribes fall under nearly exclusive federal, rather then state, control. [cit.om.] Moreover, tribal sovereignty and federal plenary power over Indian affairs, taken together, sharply circumscribe the power of the states to impose citizen-like responsibilities on Indian tribes.
>
> *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1096 (9th Cir., 2002)

> "As a matter of federal law, . . . [a tribe] is subject to suit only where Congress has authorized the suit or the Tribe has waived its immunity." *Kiowa, supra*, 523 U.S. at p. 754, . . .
>
> *Redding Rancheria v. Superior Court*, 88 Cal.App.4th 384, 387; 105 Cal.Rptr.2d 773, 775 (2001) and *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 636; 84 Cal.Rptr.2d 65, 67 (1999)

> And since it emanates from federal law, tribal [sovereign] immunity "is not subject to diminution by the States." [citing *Kiowa, supra*]
> *Trudgeon v. Fantasy Springs Casino,* 71Cal.App.4th 632, 636; 84 Cal.Rptr.2d 65, 67 (1999)

IX. THE DOCTRINE OF ISSUE PRECLUSION BARS RELITIGATION OF THIS MOTION TO QUASH.

The Tribe has separately requested the Court to take judicial notice of the judgment and the minute order and opinion of the Superior Court in the case of *People of the State of California ex rel. Lungren v. The Community Redevelopment Agency for the City of Palm Springs, Agua Caliente Band of Cahuilla Indians, et al.*, Riverside County Superior Court, civil no. 78706. In that case the Attorney General, on behalf of the People, sued the Tribe, alleging that certain off-reservation conduct by the Tribe waived its sovereign immunity. The Tribe filed a motion to quash under C.C.P. §418.10. The Superior Court granted that motion stating:

> In their Complaint the State appears to state the Tribe has waived their sovereign immunity by virtue of the Tribe's substantial activities off the reservation land and in the County of Riverside. The State however, does not address this contention in their opposition to the Tribe's motion. . . . [Opinion, p. 1, ¶3]

The case proceeded to judgment, from which no appeal was taken as to the Tribe. The judgment recites that the Court had "previously granted the Motion to Quash brought by the Agua Caliente Band of Cahuilla Indians." (P. 1, lines 21-22)

Under familiar principles of issue preclusion, this prior judgment forecloses relitigation of the same issues in this case. To act as such a bar,

> The court must consider (1) whether the issue decided in the prior adjudication was identical with the one presented in the action in question, (2) whether there was a final judgment on the merits, and (3) whether the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication.
> *Rohrbasser v. Lederer,* 179 Cal.App.3rd 290, 297; 224 Cal.Rptr. 791, 794 (1986)

See also *Garcia v. Rehrig International, Inc.*, 99 Cal.App.4th 869, 877; 121 Cal.Rptr.2d 723, 728 (2002) which formulates the test in the same set of factors as recently as this year.

The issue in both cases is precisely the same: whether this Tribe's sovereign immunity bars the Superior Court from exercising personal jurisdiction over this Tribe as to any claim, and possibly whether the Tribe's conduct is an express and unequivocal waiver of that immunity.

The prior judgment was on the merits as to the Tribe in that it disposed of all issues between the plaintiff and the Tribe, ended the litigation as to the Tribe, and could have been subject to appeal as to the Tribe had the plaintiff wished. Furthermore, the People, as plaintiff, did take an appeal from the same judgment as to another defendant. The doctrine of issue preclusion pertains equally to jurisdictional determinations.[3] *MIB, Inc. v. Superior Court*, 106 Cal.App.3rd 228, 233-234; 164 Cal.Rptr. 828, 831-832 (1980), and thus applies here.

The only real question as to whether issue preclusion applies in this case is whether the present plaintiff was the same or in privity with the prior plaintiff. In the first case, the plaintiff was the People of the State of California, represented by the Attorney General. In the present case, the plaintiff is the FPPC. The FPPC was established by the Political Reform Act of 1974, (Government Code § 81000, et seq.), which was enacted by the People as an initiative measure in 1974. The statute is cast entirely in terms of the People. "The people find and declare as follows . . ." (Government Code §81001); "The people enact this title to accomplish . . ." (Government Code §81002). Although various state officers, including the Attorney General, may bring enforcement actions (Government Code §91001), "any person" may seek injunctive relief. (Government Code §91003).

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[3] *Rehrig, supra,* applies these factors to "relitigating an *issue.*" 99 Cal.App.4th at 877, 121 Cal.Rptr.2d at 728 (2002), emphasis added. No issue is more fundamental than that of jurisdiction. In *Todhunter v. Smith*, 219 Cal. 690, 695 (1934), the California Supreme Court held that an unappealed final judgment of a lower court has such preclusive effect in an appellate court "as to such issues in the second action as were litigated and determined in the first action."

The current formulation of the privity issue in this context is:

> "In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication. [cit.om.]"
>
> *Garcia v. Rehrig International, Inc.*, 99 Cal.App.4th 869, 877; 121 Cal.Rptr.2d 723, 728 (2002)

The State of California and its agencies are certainly in privity with each other. See *French v. Rishell*, 40 Cal.2d 477, 482 (1953), in which a decision by a city's agency was res judicata as to the city before the Industrial Accident Commission. This Court held that

> the agents of the same government are in privity with each other, since they represent not their own rights but the right of the government. . . . "State" is merely a shorthand reference to the various state agencies and officials named as defendants below. Each of these defendants are agents of the State of California and had a mutual interest in the Board proceedings. They are thus in privity with those state agencies which did participate below.
>
> *Carmel Valley Fire Protection District v. California*, 190 Cal.App.3d 521, 535; 234 Cal.Rptr. 795, 803 (1963)

Under this standard, the privity requirement is met in this case. In the first case, the People were the plaintiff. In the second case, an agency created by the People through their initiative is the plaintiff. Under *Carmel Valley*, the People and the FPPC are in privity. At several points in its present First Amended Complaint, the FPPC speaks in terms of the People: "On and between January 1, 1998 and June 30, 1998, Defendant Agua Caliente Band of Cahuilla Indians injected itself into the political affairs of the People of the State of California. . ." (P. 3, ¶10, lines 12-13; p. 3, ¶12, line 27; p. 4, ¶13, line 9) These allegations confirm the community of interest between the People, in the first case, and their FPPC, acting on their behalf, in this case.

Does the FPPC believe that the representation of the People in the first action by the Attorney General was inadequate? Presumably not.

The circumstances of the first action were such that the People, speaking through their Attorney General, must have expected to be bound by the result in the first action. Had the People not intended to be bound, they would have appealed from the judgment in the first case as to the Tribe, not only as to the other defendant, as the People actually did.

Therefore, relitigation of the issue of this Court's personal jurisdiction over the Tribe in this case is foreclosed by the doctrine of claim preclusion.

X. ISSUE PRECLUSION ALSO FORECLOSES ANY CLAIM OF WAIVER BY OFF-RESERVATION CONDUCT.

The FPPC alleges at the three points noted above in its First Amended Complaint that the Tribe "injected itself into the political affairs of the People of the State of California" by taking various actions. These allegations by the FPPC of off-reservation[4] conduct are equivalent to those which the People made in the first case, and which the Superior Court specifically rejected as an express and unequivocal waiver of the Tribe's sovereign immunity, as noted above regarding "the Tribe's substantial activities off the reservation . . .".

The Tribe does not know if the FPPC now claims that this supposed "injection" is an express and unequivocal waiver of the Tribe's sovereign immunity in this case. If so, issue preclusion now also bars any new assertion by the FPPC that the Tribe expressly and unequivocally waived its sovereign immunity when it supposedly "injected itself into the political affairs of the People of the State of California" by off-reservation conduct. The People have already made such a claim; the Superior Court has already rejected it and rendered its judgment to that effect, from which judgment the People took no appeal.

XI. THE TRIBE'S IMMUNITY EXTENDS TO OFF-RESERVATION CONDUCT.

Even if claim preclusion did not bar consideration of an assertion that off-reservation

[4] The Tribe does not agree that the conduct in question occurred off the Agua Caliente Indian Reservation, but will make that assumption solely for purposes of this argument.

conduct by the Tribe is an express and unequivocal waiver of the Tribe's sovereign immunity, as a matter of federal law, off-reservation conduct by a tribe, as such, does not constitute such an express and unequivocal waiver.

> To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred. . . .
> Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and *whether they were made on or off a reservation*. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.
>
> *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 760 (1998, emphasis added)

As recently as 2001, the California Court of Appeals held that tribal sovereign immunity extends to a claim against a tribe for an off-reservation tort in *Redding Rancheria v. Superior Court*, 88 Cal.App.4th 384, 105 Cal.Rptr.2d 773 (2001), citing with approval another case that upheld tribal sovereign immunity as against a claim of waiver by recording liens off-reservation:

> Well-reasoned cases have rejected this view. . . . [cit.om.] See also *Puyallup Tribe v. Washington Game Dept.* (1977) 433 U.S. 165, 172-173 . . . [State could not sue Tribe for off-reservation conduct, only tribal members]. . . . See *Kiowa, supra*, 523 U.S. at p. 760, . . . ["Tribes enjoy immunity from suits on contracts, . . . whether they were made on or off a reservation"]; *Thompson v. Crow Tribe of Indians* (1998) 289 Mont. 358, 365, 962 P.2d 577, 581 [suit to cancel liens Tribe filed with county recorder, "the fact that the Tribe's action in filing its tax liens occurred off-reservation is of no consequence as regards its defense of sovereign immunity", citing *Kiowa*].
>
> *Redding Rancheria v. Superior Court*, 88 Cal.App.4th 384, 388; 105 Cal.Rptr.2d 773, 776, 776 (2001)

Redding is thus the Third District's most recent pronouncement on the doctrine of tribal sovereign immunity. *Redding* squarely affirms the doctrine, including that off-reservation conduct, as such, does not amount to an express and unequivocal waiver. *Redding* is thus controlling here, both in general and with regard to any claim of off-reservation conduct.

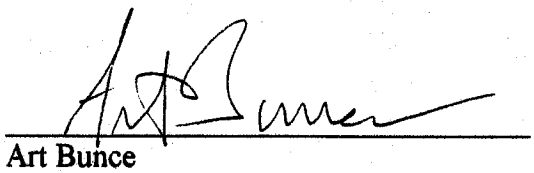
CONCLUSION

As the Supreme Court has held, "Indian tribes occupy a unique status under our law."[5] Tribes are not subordinate to states and their law. On the contrary, Indian tribes "have a status higher than that of states."[6] Because of this unique and elevated status, tribes are not subject to state statutes in the sense of being subject to the personal jurisdiction of state courts in enforcement actions by state agencies. The FPPC has not even alleged, much less shown, any express and unequivocal waiver by Congress or the Tribe. Thus, the FPPC has not met its burden of showing personal jurisdiction, as is required of a plaintiff in a motion under C.C.P. §418.10. *Floveyor, Int'l, Ltd. v. Superior Court*, 59 Cal.App.4th 789, 793-794; 69 Cal.Rptr.2d 457, 460 (1997).

For these reasons, the Tribe urges the Court to quash service of the summons on it.

Dated: November 1, 2002

Respectfully submitted,



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[5] *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845, 851 (1985)
[6] *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir., 1959)

Fair Political Practices Commission v. Agua Caliente Band of Cahuilla Indians, et al,
Case No. 02AS04545

Proof of Service

I am employed in the City of Escondido and County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is Law Offices of Art Bunce, 430 North Cedar St., Suite H, Escondido, CA 92025.

On November 6, 2002 I served the attached

> Opening Memorandum of Points and Authorities of Specially-Appearing Defendant Agua Caliente Band of Cahuilla Indians in Support of Motion to quash Service for Lack of Personal Jurisdiction

on the party(ies) in this action by placing a true copy thereof in the sealed envelope(s), addressed as follows:

> Steven Benito Russo, Esq.
> Luisa Menchaca, Esq.
> William L. Williams, Jr., Esq.
> Holly B. Armstrong, Esq.
> Fair Political Practices Commission
> 428 J Street, Suite 620
> Sacramento, CA 95814

☒ (BY MAIL) I placed such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at The Law Offices of Art Bunce, Escondido, California, following ordinary business practices. I am familiar with the practice of the Law Offices of Art Bunce for collection and processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Escondido, California on November 6, 2002.

Sue C. Calvert

Sue C. Calvert